Central Law Journal.

ST. LOUIS, MO., JULY 23, 1915.

SPECIAL REPORT OF COMMITTEE TO ILLINOIS STATE BAR ASSOCIATION AT SESSION OF 1915 ON MASTERS IN CHANCERY.

This report deals greatly with conditions in Chicago, which, as a former president of the Illinois State Bar Association said, constitutes "an empire in itself," and the need there especially for masters lies in the fact of the congested condition of court dockets.

A reference to a master, however, often is resorted to in common law cases, where no question in equity is involved, as, for example, complicated accounts, and thereby much expense is saved to the public and saddled upon litigants.

It is stated in this report that the average daily expense of a court is from $100 to $125, and it is conceded that in such cases as are referred to masters, the ordinary time for trying one of them would consume several days, if we may admit that a jury is suited to try such cases.

There being, in their essence, cases in which the right of trial by jury may be constitutional, it becomes a question whether statutes which provide for reference, except upon consent of parties, are valid. When they consent and thus relieve the public of great expense, it would seem not only just, but good policy in law, to allow the case to stand as to costs the same as were it tried by the court. We have little doubt, that the question of costs very often determines agreement or not to a reference, where a party may object.

In line with this idea is what was said by a circuit judge outside of Chicago, that: "In the country, where litigation seldom refers to very important matters, we hesitate to saddle the parties with the unnecessary expense (of a reference)." This goes further to show, that there is inequality among litigants whose cases, in a compulsory way, are referred, and those whose cases are disposed of in open court.

But the Central Law Journal pointed out nearly forty years ago (5 Cent. L. J. 278), and this is referred to by the committee, the evils of the fee system in trials before masters, by saying: "A referee sometimes finds himself sitting as a judge in his own case. His fees are to be taxed and collected as costs in the suit. Suppose, then, that the plaintiff is solvent and the defendant insolvent, he is under the direct temptation to decide in favor of the latter, knowing that if judgment goes against the insolvent party, he, the referee, will lose all compensation for his services. * * * No officer who is called on to act judicially should receive a fee dependent upon the event of the litigation."

The solution proposed by the committee is that masters be made assistant judges and receive salaries just as regular judges do, and that they be barred from practicing law.

As it is now in many states, arrangements are made by attorneys for compensation of masters as a hearing progresses and not have their compensation paid at some indefinite time in the future, when a losing party shall have exhausted his remedies, the compensation then to be deemed such "as the court may deem just."

This is faulty, because it requires a judicial officer to depend upon an uncertainty, and who the judicial officer that may decide this question is also uncertain, whether the judge who appointed him or some remote successor. But, at all events, deciding a question of this kind is embarrassing to judges for several reasons. A dry record may be very inconclusive evidence on the

subject, and the master or referee is put in the position of being tempted to overstate his labors and have them underestimated by the attorney whose client has to pay. It does not lend greatly to the dignity of justice to have altercations of this kind for solution.

Furthermore, if there is a sort of haphazard in distributing appointments in references, first to one attorney and then to another, there are favors which a judge has to pass out to his friends, and there is no building up among those, who are to be of assistance to the judiciary, the training for the performance of their duties.

It seems a little inconsistent that statutes should provide for references and give to findings of masters so much importance and yet make their compensation the possible occasion for an unseemly squabble, where their services have saved the public from great expense. We may add, also, that some allowances made show more of personal than judicial view in these matters; more often they appear exorbitant than insufficient. They are based greatly on amount involved, when all questions decided by a judge recognize no such basis, nor the work involved, nor its difficulty.

If a court is given authority to appoint a standing master, the office should be deemed of enough importance to give the appointee a certain living, and free him from every embarrassment of negotiation with parties or appeals to the uncertain discretion of judges. Judges themselves should be relieved, as far as possible, from petty questions of the *quantum*, quality or value of the services of their own appointees.

Finally, we again urge, that, if references save in general expense in administrative justice, it ill becomes the state to make particular litigants to pay for such saving out of their own pockets. It is not difficult for any judge to recall cases where he was greatly embarassed in deciding such cases, nor to notice how very greatly judicial view on a subject of this kind varies.

NOTES OF IMPORTANT DECISIONS.

BANKRUPTCY—SUFFICIENT NOTICE TO CREDITORS.—In Kreitlein v. Ferger, 35 Sup. Ct. 685, it was ruled that a schedule of creditors showing "a debt in 1895 of $271.85 for merchandise to C. Ferger, Indianapolis," and notice sent out accordingly through the mail to "C. Ferger, Indianapolis," and never received, was *prima facie* sufficient compliance with bankruptcy law to discharge the debtor upon his adjudication in bankruptcy, there being dissent by Justice Day, Justice McKenna concurring therein.

The scheduling was shown to be faulty in the fact, that the debt went to judgment in 1897 and was for the sum of $300, and notwithstanding the wrong amount was stated, and a different nature of the claim, and only an initial was given in a notice to a creditor in a large city, the bankrupt was held discharged. Justice Day observes that this "seems to me to establish a rule by which many creditors will find their debts paid by a discharge in bankruptcy when they have had no knowledge or means of knowing that such proceedings were pending, and are not able to participate in such dividends as are paid to creditors."

The majority opinion speaks of "bankruptcy rules of force in the Southern District of New York" and their providing that there the street number and address in the city should be given, and there not being any similar regulation in the Indiana District, but, independently of rules, it surely ought to be true that inquiry might be made as to whether the debtor, in seeking a benefit under the bankruptcy statute, acted in good faith in filing his schedule, and this the court holds to be true as it is adjudged that there is a *prima facie* compliance with the statute. It would look like, however, that the burden ought to be on the debtor under the rule that *prima facie* there is insufficient compliance. A debtor is supposed to treat his creditors with impartiality, and to give full names and addresses of some and not of others in notices hardly seems to measure up to this requirement.

JUDGMENT—IDENTITY OF ISSUES UNDER FULL FAITH AND CREDIT CLAUSE.—The faith and credit clause of the constitution is not only available to show a judgment in one state is a bar to a suit in another state, but also if a judgment has been rendered in one State and there is a question of fact as to whether it is conclusive of the right to sue in another state, it may be used in evidence along

with other facts to show the action in the other state is governed or affected thereby. Hartford L. Ins. Co. v. Ibs., 35 Sup. Ct., 692. In this case there was a suit upon a certificate of membership in a department of an insurance company conducted on the mutual assessment plan. The company claimed a forfeiture for nonpayment of an assessment and plaintiff replied that out of a prior levy there was enough to meet deaths occurring when decedent member died, and the assessment unpaid by him was unnecessary.

Defendant offered a judgment in a representative suit by some 30 of the 12,000 members claimed to authorize accumulation by the company so as to pay losses in advance of the receipt of moneys to pay the same from regular assessments.

The opinion speaks of this judgment having been rendered in a court of the state where the company was chartered and where the fund to pay assessments was maintained, and of impossibility for the company to bring a suit against 12,000 members living in different parts of the United States, and equally impossible for the 12,000 to sue the company. "The decree in such a suit brought by the company against same members as representative of all, or brought against the company by thirty certificate holders for 'the benefit of themselves and all others similarly situated' would be binding upon all other certificate holders."

But objection was made that the questions were different in the two cases—one cause of action "involving the status of the fund and the rights of the members therein, while the present case related to the right of a beneficiary to recover on a policy and the power of the company to declare a forfeiture." The court replied that defendant contended that the policy had lapsed for failure to pay an assessment authorized by the judgment offered in evidence, and in reversing the ruling of the state courts it was held that "the Connecticut decree was admissible" on that issue.

DAMAGES—CONSCIOUS PAIN AND SUFFERING BETWEEN ACCIDENT AND DEATH.—By amendment of federal employers' liability act right of action for suffering by an employe injured in an accident survives his death as also by the original act the right to sue for the loss caused by his death to those entitled to sue. The measure of damages for such conscious pain and suffering is seen by the case of St. Louis I. M. & So. R. Co., 35 Sup. Ct., 704, not well defined.

In this case decedent survived his injuries more than half an hour, and they were such as were calculated to cause him extreme pain and suffering if he remained conscious. As to his being conscious witnesses differed in opinion, some saying he groaned every once in a while and he would raise his arm and try to pull himself. The jury awarded $11,000 on this cause of action, which the state Supreme Court cut down to $5,000.

The Federal Supreme Court said: "The case is close to the border line for such pain and suffering, as are substantially contemporaneous with death or were incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under statutes like that which is controlling here."

As to the claim that the damages awarded are excessive for pain and suffering for so short a period it was said: "The award does seem large, but the power and with it the duty and responsibility, of dealing with that matter rested upon the courts below. It involves only a question of fault, and is not open to consideration here."

Here there was being considered a fixing of the sum by a state appellate court and we do not see wherein its duty was one whit different from that of the final appellate court, namely the United States Supreme Court. Would this court have affirmed the $11,000 verdict, had it gotten by the state supreme court? We doubt very much that it would.

But if it was at all conjectural whether consciousness supervened the injury, should a verdict be allowed to stand? Did groans every once in a while show decedent was continuously conscious? There is such a disposition to accentuate pain, where it alone is considered as an element of damage, that the rule of the measure ought to be more certain than it is. There ought to be some better definition of "substantially contemporaneous with death." Is there any reasonable ground for saying there is $5,000 difference in a man being killed instantly or dying in half an hour?

RECENT DECISIONS IN THE BRITISH COURTS.

Constitutional questions in the British courts have mainly concerned the powers of municipalities and companies, but in Deere Plow Co. v. Wharton, 1915 A. C. 330, a much wider field was entered, and one which will probably demand increasing attention. The plaintiff company was incorporated by letters patent under the authority of the Companies Act of Canada,

1906, a Dominion statute, and by its charter was empowered to carry on throughout the Dominion the business of dealers in agricultural implements. By the British North America Act of 1867, the Dominion of Canada parliament was empowered to legislate inter alia for the regulation of trade and commerce, and the Companies Act referred to purported to have been passed under these powers. But the province of British Columbia in 1911 passed a companies act of its own, which required every company incorporated otherwise than under the laws of the province to be licensed or registered under the provincial law and provided that until it was so licensed or registered, it should not be capable of carrying on business in the province. The Deere Plow Company applied for such a license, but was refused one on the ground that there was a company of the same name already on the Columbian register. Legal proceedings ensued, and the Privy Council has now decided that the provision of the British Columbian parliament requiring the licensing or registration of Dominion companies was ultra vires the provincial legislature, and that the power of the Dominion parliament to legislate for the regulation of trade and commerce enabled that parliament to prescribe the extent and limits of the powers of companies, the objects of which extended to the whole Dominion.

We note another point on the subject of ultra vires, which in those days of social reform and labor amelioration propaganda, ought to be kept in view. The corporation of Kingston, Jamaica, desiring to better the conditions of service of their employes, decided to provide means of recreation for them, and proceeded for that purpose to exercise certain statutory powers of compulsory purchase which had been conferred on them. The Supreme Court of Jamaica held that such a step was not competent to them, and the Privy Council has affirmed that judgment. The proposals of the corporation were acknowledged to be enlightened and humane, and would no doubt add to the efficiency of the employes, and in the long run conduce to the profitable working of the tramways, but they were not of a nature necessary to maintain the working of the undertaking, which was all their statutory powers entitled them to do.

A question which sooner or later comes up in company practice, is whether when a company has borrowed to the limit of its borrowing powers, as defined in its constitution, it can borrow something more to be applied in or towards paying off the existing loan. It has been held (In re Harris Calculating Machine Co., 1915 1 Ch. 920) that if the money is actually so applied, there is no overborrowing. "The test is, has the transaction really added to the liabilities of the company?"

Following on a decision of the Privy Council (Victorian Railway v. Coultas, 1888 L. R. 13 A. C. 222), it has till recently been the general rule not to award damages in respect of nervous fright or mental injury arising from sudden terror, unaccompanied by any physical injury; but that principle has been discarded, and now cases not seldom occur in which damages for shock are awarded, even though the plaintiff has sustained no actual blow or physical impact otherwise. Lately an attempt was made to extend this still further. Action was raised against a firm of carriage hirers for damages in respect of shock caused to plaintiff on seeing her young brother run over by a vehicle negligently driven by one of defendant's servants. The court dismissed the case, holding the damages too remote to be recoverable by law, for though now actual physical impact is not a condition essential to recovery, yet the fright or nervous shock must be due to apprehension of danger to the plaintiff, whereas here it was admittedly due to her apprehensive danger to her young brother.

A point of much practical interest arose in re Fleetwood v. Syndicate Ld., 138 L. T. 341, which was an action to determine whether a payment by the voluntary liquidators of the company to creditors of the company whose debts were statute barred, was a proper payment. In 1914 the court directed the liquidator to apply the balance in his hands after payment of costs and his own remuneration "in due course of administration." Creditors whose debts were not statute barred were paid, and the claimants to the surplus remaining in the liquidators' hands were the shareholders, and the statute barred creditors. The liquidator said that his position was analogous to that of an executor or administrator, who was not bound to plead the statute, but the court held that whether a liquidator was in the same unfettered condition as an executor or not, he certainly was not so in this case, as shareholders here had objected to the payment of any statue barred debts, and that being so, a liquidator who had been directed to deal with the assets in due course of administration could only distribute them among those who had legal claims.

DONALD MACKAY.

Glasgow, Scotland.

THE WATERS OF JORDAN.

"I tell you, Miss, your mother has no right to this here spring water. It's mine. I contested ol' Jordan for this 160, beat him in the land office over in L——. He carried it up clean to the Commissioner of the Land Office in Washington an' I beat him there, an' it's mine and this here spring water goes with it."

"But I tell you it isn't yours—it's mother's. She got the consent of good old Mr. Jordan to pipe this water to her ranch and afterwards mother made her proofs under the permit issued by the State Engineer's office and therefore it's hers. If we can't use this water we won't have any; it's our only supply."

"Well, you can't use this spring water—that's certain. You get busy and run your cistern full and then—out goes the pipe line."

"You won't do anything of the kind. Touch that pipe line and you are headed for the land of trouble."

Girl of twenty against man of forty, scrapping over the eternal question, out in the Golden West, of the use of water. Water, without which the land remains a waste, a desert, an arid plain; but with it, it is made to blossom like the rose.

Blanche Williams was a good-looking girl, a product of the East—a boarding-school girl at that. But back in her Kentucky ancestry there had been fighting blood, blood of the pioneers. This naturally followed, for had not her great grandfather been a companion of Boone and was not her mother one of the Marshalls of that famous old state? So it was bound to take place that the girl didn't quail before the threats of the man.

Who was the man? His name was Jim Grace. He was one of those products of the West who seem to make money—just how, no one seems to know—and sometimes it isn't healthy to inquire. Prior to the opening of our story he had been employed by the big cattle company near by, the Bar L, as a cow-puncher. Now he was ostensibly a rancher on his newly-acquired homestead.

Blanche and her mother, after the panic of '07 had swept everything away and left the father a broken and dispirited man and who, a year or two later, rather than take arms against a sea of troubles, decided to end them, which he did with his own hand, decided to move west. This they did by removing to the State of Idaho. The mother entered a homestead claim and the girl easily found a teacher's position in the school near by.

The land had to be irrigated. A large spring on the adjoining ranch was sufficient for their needs. Its owner, old Mr. Jordan, permitted the Williamses to pipe the water to their ranch and later they completed their appropriation under the laws of their state. Jordan, however, failed to meet the requirements of the government relating to homesteads and this left an opening for Grace to contest his claim, with the result set forth.

Need it be stated that Blanche had suitors a-plenty? Hardly necessary, yet for the purposes of this story, we will state that she did have a-plenty; and Jim Grace was one of them. Among others, there were cowboy suitors, ranch suitors and suitors in the county seat near by. Among the latter were clerks, a young merchant or two, the son of the banker and—a young lawyer.

The conversation, at the point where we left off was resumed by Grace.

"Now, Miss Blanche, I've got this water right cinched. You can't get any right to it. Now, why can't you and me just as well splice up together and then your ma will have a place to live in just as long as she cares to. Come, honey, won't you do that?"

"No, I certainly will not. Don't you dare ask me again to marry you. I'd rather marry the worst cattle rustler around here

than you. And I warn you again not to disturb this pipe line."

The girl mounted her horse and started off, but Grace flung after her:

"That pipe line goes out to-night. Better fill your cistern this afternoon. You can't talk that away to me and git away with it. I'll show you. I've got the law on my side."

Blanche returned to the ranch and related to her mother what had passed between her and Grace.

"Perhaps he is only bluffing and won't do anything after all, Blanche," said the mother. "He certainly won't be mean enough to cut off our only supply of water."

"He'd better not. I'll get Jack—I mean Mr. Parker—after him," and Blanche blushed a little at the mention of the name of the young lawyer.

The next morning Mrs. Williams arose early from a restless, almost sleepless night and went out to the pipe line. Not a drop of water was running. Slowly she returned to the house and sat down weakly at the kitchen table. So Grace had carried out his threat. Presently Blanche came in, noticed her mother's dejected look and without a word went out to the pipe line, returned to the house and announced that she was going to town. Mounting her pony she followed the pipe line to the point where it came from the Grace homestead and saw that Grace had made good his threat—the pipe lay disjointed near the spring.

Blanche was soon in the law office of young Mr. Parker, relating to him the destruction of the pipe line and her talk with Mr. Grace.

"We'll enjoin him," promptly said the lawyer. "But, do you know, Blanche, we're up against a hard proposition; and that proposition is the Bar L ranch. You know the company wants that land that Grace has taken up and particularly that spring. Since the big ranges have been broken up, the cattle companies are hard pressed to get enough water for their cattle. So while I can't prove it now, I am pretty reliably informed that Jim Grace contested the Jordan claim in order to turn it over to the cattle company later. Grace's lawyer, Clay Smith, was his attorney in the contest case until it was settled and it's a sure thing that Grace hasn't the money of his own to pay the fees that Smith demands. But, we'll not let that scare us out. I'll get busy with the papers at once. We'll have Jim Grace by the ears in less than no time. You can help, Blanche, by 'phoning to the ranch for your mother and a neighbor—someone who knows about this proceeding of Grace's—to come in, and then you and the other party can sign the affidavit that I'll have ready by the time they will be here. I'll find someone to go on your bond."

By twelve o'clock that day, on a proper showing that an emergency existed, Judge Ruckles, of the district court, had granted a temporary restraining order against Grace; and Grace had to put a stop to any further breaking up of the pipe line.

Four days later, the parties were all in court; Grace represented by the cattle company's attorney, Hon. Clay Smith, and Mrs. Williams by young Mr. Parker. The young lawyer felt confident that the court would be with his client. But, he reckoned without his opponent, for the Hon. Clay Smith was, without dispute, the leader of the local bar, and there were other bright members of that bar. He was astute; indeed, he was so well posted in his profession that there were those who called him tricky. So, when the Hon. Clay Smith took up the argument, young Mr. Parker soon felt that something was going wrong. Something did go wrong, for the court decided against the widow and her pretty daughter and entered an order denying the injunction.

* * * * * *

Back to the office went Mrs. Williams, Blanche and young Parker.

"We'll appeal this case at once," said Parker. "We'll get that bunch of robbers yet."

"You bet we will," chorused Blanche. "Go to it, Jack, we will stay with you if I have to teach forty years to pay you."

"Pay me," said the young man; "you'll pay me all right by marrying me. We might as well have that understood now, Mrs. Williams."

"Now, Jack," interposed Blanche, "just win that case first and then come around and see us."

On their way home, the ladies were overtaken by the triumphant Mr. Grace.

"Good afternoon," he said.

"Good afternoon," they answered.

"Sorry the Judge decided against you. But you see, I had the law on my side. Your ranch isn't worth a cent now, but I'll tell you what I'll do. If Miss Blanche here will mar—"

"Mr. Grace, if you ever speak of marriage to me again, you'll regret it. You know what I think of you; and I think less of you now than I did. We are going to appeal this case and we'll get you in the supreme court."

"Now, that is a foolish thing to do," argued Grace. "Isn't Judge Ruckles on the square? Doesn't he know all about irrigation law? What's the use of going to all the expense of appealing the case when it's as good as settled now?"

"I'll take care of the costs," replied Blanche, and she blushed a little as she thought of the fee she was to give Jack. "Will you please drive on and let us alone?"

"Well, the offer is still open any time you want to take advantage of it, Miss," leered Grace as he rode on.

"How I detest that man, mother," said Blanche, "he is too mean to stay in the country."

* * * * * *

About one year after the events we have related occurred, a very happy group were assembled in the office of Jack Parker, lawyer. It consisted of Mrs. Williams, her daughter, Blanche; and Parker. The latter was saying: "Now I will explain briefly what the supreme court had to say in reversing the decision of Judge Ruckles. In the first place, we took the position that your mother went onto the land of Jordan with his consent; that Jordan was the first entryman, and, so far as the Government of the United States was concerned, she had its consent to enter and appropriate any waters on the land under and by virtue of the provisions of Sec. 2339, R. S. United States, U. S. Comp. 1901, p. 1437, which reads: 'Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws, and the decisions of the courts, the possessors and the owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed . . .'

"We next took the position that your mother after learning that she had not yet made a valid appropriation of water under our state laws, applied to the state engineer for a permit to appropriate the spring waters and thereafter made proof of the completion of the pipe line and the application of the water to a beneficial use, under the provisions of the permit.

"In support of our claims we cited the following cases: Maffet v. Quine[1] and San Jose Land & Water Co. v. San Jose Ranch Co.[2]

"The Honorable Clay S. came back at us with this: That this land of Jordan's was not public land, but, on the contrary had been segregated therefrom by Jordan's homestead entry and was not open to the acquisition of a water right and the right of way for pipe line prior to the cancellation of the Jordan homestead entry and that immediately upon the cancellation of the

(1) U. S. C. C., 93 Fed. 347.
(2) 129 Cal. 673, 62 Pac. 269; (See Delphine Lequime et al. v. Josephus Chambers, 15 Idaho 405, 98 Pac. 415, and 21 L. R. A. (N. S.) 76 for other and more recent cases in point).

homestead entry Grace's preference right attached by virtue of his having been the successful contestant of the homestead entry. The Honorable Clay S. also insisted that no right attached on the part of your mother, or anyone else, between the time of the cancellation of the first homestead entry and the making of your mother's entry thereafter.

"But the Supreme Court said: Nothing doing, you're wrong in every step, so far. 'Appellant's water right had attached in conformity with the state law and the act of congress prior to the filing of respondent's homestead entry, and that respondent consequently acquired his water right in and to the land from the United States subsequent to the prior right of way and water location of appellant.'

"But the Hon. Clay S. didn't stop with the above arguments. Not much; he had another sixteen-inch shot to fire, which was this: that the spring waters were purely seepage and percolating waters and did not come from any well-defined subterranean stream; that they were not subject to location under the laws of Idaho and that their appropriation, therefore, was not protected under the act of congress. He cited the case of Southern P. R. Co. v. Dufour[3] in support of this contention. But we showed that this case had been distinguished and greatly modified, if not entirely overruled, on this particular point in the more recent cases of Katz v. Walkinshaw[4] and the case of Cohen v. La Canada Land & Water Co.[5]

"So we are all right now, are we Mr. Parker?" asked Mrs. Williams.

"Indeed you are, both of you. That injunction we asked for will be made permanent and if anybody goes to interfering with the spring again, we will make it hot for them."

"Now, Blanche, I have just three things more to mention: Firstly, Grace transferred his 160 to the cattle company, but the government got next to it and he's skipped out. Secondly, the Honorable Clay Smith has offered me a partnership; and thirdly, we are going to be married at six o'clock this evening."

"Oh, Jack, you're a dear," said Blanche.

JOHN E. ETHELL.

Glenwood Springs, Colo.

(3) 95 Cal. 615, 19 L. R. A. 92, 30 Pac. 783.
(4) 141 Cal. 116, 64 L. R. A. 236, 99 Am. St. Reps. 35, 70 Pac. 663, 74 Pac. 766.
(5) 142 Cal. 437, 76 Pac. 47.

CRIMINAL LAW—CONTINUOUS OFFENSE.

MORGAN v. DEVINE.

35 Sup. Ct. 712.

Persons who steal postage stamps and postal funds from a post-office of the United States after having burglariously entered such post-office with intent to commit a larceny therein commit two distinct offenses, which may be separately charged and punished.

This case was submitted at the same time with No. 736, just decided (237 U. S. —, ante, 710, 35 Sup. Ct. Rep. 710), and involves to a considerable extent the same questions. The appellees, Devine and Pfeiffer, pleaded guilty to an indictment containing two counts in the District Court of the United States for the Eastern Division of the Southern District of Ohio, the first count being under § 192 of the Penal Code (35 Stat. at L. 1125, chap. 321, Comp. Stat. 1913, § 10,362), charging that the appellees did, on the 13th of January, 1911, in the county of Delaware, in the state of Ohio, unlawfully and forcibly break into and enter a building used in whole as a post-office of the United States, with the intent then and there to commit larceny in such building and post-office, to-wit: to steal and purloin property and funds then and there in use by and belonging to the Post-office Department of the United States. The second count was drawn under § 190 of the Penal Code, charging that the appellees, on the same date and at the same place, did unlawfully and knowingly steal, purloin, take, and convey away certain property and moneys of the United States, then and there in use by and belonging to the Post-office Department of the United States, to-wit: postage stamps and postal funds, etc. One was sentenced to confinement in the United States pen-

itentiary at Leavenworth, Kansas, for four years on the first count, and for two years on the second count of the indictment, the sentence to be cumulative, and not concurrent. The other appellee was likewise sentenced for three and one-half years' imprisonment and a fine of $100 on the first count, and two years on the second count. It is admitted that the acts set forth in the second count were performed by the appellees in the post-office under the burglarious entry charged in the first count. Having served the larger part of their sentences under the first count, appellees filed their petition in the District Court of the United States for the District of Kansas, asking for a writ of habeas corpus, and to be discharged from confinement at the expiration of the sentence under the first count. The District court, believing the case to be controlled by the case of Munson v. McClaughry, 42 L. R. A. (N. S.) 302, 117 C. C. A. 180, 198 Fed. 72, decided by the Circuit Court of Appeals of the Eighth Circuit, entered an order discharging the appellees from imprisonment at the expiration of their term of confinement under the first count of the indictment.

It is the contention of the appellees that protection against double jeopardy set forth in the Fifth Amendment to the Constitution of the United States required their discharge, because the several things charged in the two counts were done at the same time and as a part of the same transaction.

The statutes under which the indictment was found are as follows:

"Sec. 190.—Whoever shall steal, purloin, or embezzle any mail bag or other property in use by or belonging to the Post-office Department, or shall appropriate any such property to his own or any other than its proper use * * * shall be fined not more than $200, or imprisonment not more than three years, or both."

"Sec. 192.—Whoever shall forcibly break into, or attempt to break into any post-office * * * with intent to commit in such post-office * * * any larceny or other depredation, shall be fined not more than $1,000, and imprisonment not more than five years."

Whether, under these sections of the statute, two offenses in the same transaction may be committed and separately charged and punished, has been the subject of consideration in the federal courts, and the cases in those courts are in direct conflict. In Halligan v. Wayne (C. C. A. 9th C.), 102 C. C. A. 410, 179 Fed. 112, and Munson v. McClaughry, supra, it was held that upon conviction on an indictment containing two counts, one charging burglary with intent to commit larceny, and the other larceny, upon a general verdict of guilty, there can be but a single sentence, and that for the burglary only; and that after the defendant has served a sentence for that offense he is entitled to release on habeas corpus. The rule has been held to be otherwise in Ex parte Peters (C. C. W. D. Mo.), 2 McCrary, 403, 12 Fed. 461, and in Anderson v. Moyer (D. C. N. D. Ga.), 193 Fed. 499.

We think it is manifest that Congress, in the enactment of these sections, intended to describe separate and distinct offenses, for in § 190 it is made an offense to steal any mail bag or other property belonging to the Post-office Department, irrespective of whether it was necessary, in order to reach the property, to forcibly break and enter into a post-office bulding. The offense denounced by that section is complete when the property is stolen, if it belonged to the Post-office Department, however the larceny be attempted. Section 192 makes it an offense to forcibly break into or attempt to break into a post-office, with intent to commit in such post-office a larceny or other depredation. This offense is complete when the post-office is forcibly broken into, with intent to steal or commit other depredation. It describes an offense distinct and apart from the larceny or embezzlement which is defined and made punishable under § 190. If the forcible entry into the post-office has been accomplished with the intent to commit the offenses as described, or any one of them, the crime is complete, although the intent to steal or commit depredation in the post-office building may have been frustrated or abandoned without accomplishment. And so, under § 190, if the property is in fact stolen, it is immaterial how the post-office was entered, whether by force or as a matter of right, or whether the building was entered into at all. It being within the competency of Congress to say what shall be offenses against the law, we think the purpose was manifest in these sections to create two offenses. Notwithstanding there is a difference in the adjudicated cases upon this subject, we think the better doctrine recognizes that, although the transaction may be in a sense continuous, the offenses are separate, and each complete in itself. This is the result of the authorities as stated in Mr. Bishop in his new work on Criminal Law, 8th ed.:

"If in the night a man breaks and enters a dwelling house to steal therein, and steals, he may be punished for the two offenses or one, at the election of the prosecuting power. An allegation simply of breaking, entering, and stealing states the burglary in a form which

makes it single, and a conviction therefor will bar an indictment for the larceny or the burglary alone. But equally well a first count may set out a breaking and entering with intent to steal, and a second may allege the larceny as a separate thing, and thereon the defendant may be convicted and sentenced for both." Vol. 1, § 1062, p. 638. "The test is whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be." Section 1052, p. 630.

That the two offenses may be joined in one indictment is made plain by § 1024 of the Revised Statutes of the United States, Comp. Stat. 1913, § 1690, which provides:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them consolidated."

The reason for the rule that but a single offense is committed and subject to punishment is stated in Munson v. McClaughry, supra, as follows:

"A criminal intent to commit larceny of property of the government is an indispensable element of each of the offenses of which the petitioner was convicted, and there can be no doubt that where one attempts to break into or breaks into a post-office building with intent to commit larceny therein, and at the same time commits the larceny, his criminal intent is one, and it inspires his entire transaction, which is itself in reality but a single continuing criminal act."

But the test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the act of Congress. In Burton v. United States, 202 U. S. 344, 50 L. Ed. 1057, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362, the defendant was charged in separate counts with receiving compensation in violation of the act, and also agreeing to receive compensation in violation of the same statute. In that case the contention was that the defendant could not legally be indicted for two separte offenses, one agreeing to receive compensation, and the other receiving such compensation, in violation of the statute, but this court held that the statute was so written, and said:

"There might be an agreement to receive compensation for services to be rendered without any compensation ever being in fact made, and yet that agreement would be covered by the statute as an offense. Or, compensation might be received for the forbidden services without any previous agreement, and yet the statute would be violated. In this case, the subject-matter of the sixth count, which charged an agreement to receive $2,500, was more extensive than that charged in the seventh count, which alleged the receipt of $500. But Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied. Therefore, an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense. There is, in our judgment, no escape from this interpretation consistently with the established rule that the intention of the legislature must govern in the interpretation of a statute."

Reversed.

NOTE.—*Larceny Committed in Housebreaking Merged in Burglary.*—The reasoning pursued in the instant case would about do away with the principle, if it is a principle, of the common law of merger of a lower offense in a higher, where both are committed in one transaction, as there seems nothing peculiar in the federal statute, as showing intent to avoid the application of such principle. When one is charged with burglary with intent to commit a larceny or felony, this means any larceny or any felony that is defined by law, common or statute, and unless it can be shown that the larceny or felony intended to be committed, is somewhere else separately defined, proof of burglary must fail. If the federal statute does any more than separately define the thing intended to be committed in the burglary charged it is not pointed out in the reasoning that this is so.

Furthermore, we take it that the opinion recognizes this to be true, otherwise it would not say "there is a difference in the adjudicated cases on this subject," for we do not believe anyone would dispute the proposition, that a legislative body could, if it specifically so intended, abolish the principle of merger. Therefore the opinion seems to us somewhat uncertain, because it appears to oscillate between announcement of a principle and the declaration of legislative intent. How far the non-speaking members of the court were committed by the reasoning it is hard to say.

Munson v. McClaughry, 198 Fed. 72, 117 C. C. A. 180, 42 L. R. A. (N. S.) 302, is a very elaborately reasoned opinion, where the identical statutes considered in the instant case were

involved, Sanborn and Hook, C. J. J., and Willard, D. J., concurring in the conclusion that the larceny constituted part of the burglary, as a continuous criminal act. He would not have said this, however, had murder have been committed, because that is a higher offense, either specifically defined as arising out of a burglarious intent, or because burglary of itself shows the necessary ingredient of murder. But it does not show the necessary ingredient of larceny, but the latter is swallowed up in the burglary.

Judge Sanborn, in the Munson case, refers to Bishop on Cr. Law, Sec. 1062, as the instant case does, but he denies that the cases Bishop cites support the text which the instant case quotes, and Judge Sanborn further says that Mr. Bishop, after citing cases on each side of this question, says that: "To make a burglary thus double and punish it twice, first as burglary, and secondly as larceny, hardly accords with the humane policy of our law." How the instant case was able to cite and quote Bishop in support of its view we do not understand. Judge Sanborn thinks the theory the Supreme Court adopts took its rise in the federal courts in a decision in 12 Fed. 461, and in one state court in 24 Conn. 57, where was a dissent by Chief Justice Waite.

An elaborate note in 31 L. R. A. (N. S.) 727, reveals what seems to us a distinction that is not observed in the instant case. Thus it is held that an acquittal or conviction of larceny will be no bar to a prosecution for burglary. People v. Devlin, 143 Cal. 128, 76 Pac. 900; Territory v. Willard, 8 Mont. 328, 21 Pac. 301; State v. Hooker, 145 N. C. 581, 59 S. E. 866; People v. McCloskey, 5 Park Crim. Rep. 57; Wilson v. State, 24 Conn. 57; State v. Ingalls, 98 Iowa 728, 68 N. W. 445. But as to acquittal or conviction of burglary being in bar of a prosecution for larceny the authorities appear divided. In favor of the bar are State v. DeGraffenseid, 9 Baxt. 287; People v. Smith, 57 Barb. 46 (if a count also included larceny); Triplett v. Com., 84 Ky. 193, 1 S. W. 84; Davis v. State, 3 Caldw. 77. Opposing view is shown in Howard v. State, 8 Tex. App. 447; State v. Warren, 14 Ind. 572; People v. Barrow, 80 Mich. 567, 45 N. W. 514; Benton v. Com., 91 Va. 782, 21 S. E. 495. Some of these cases show construction of statutes as to intent.

Other cases by implication of reasoning admit the principle that acquittal or conviction of burglary is a defense to a charge of larceny in the same transaction. Thus it was ruled that acquittal of burglary with intent to steal would not be a bar to an indictment for receiving stolen property, though the two offenses involve the same transaction. Pat v. State, 116 Ga. 92, 42 S. E. 389, 15 Am. Cr. R. 290. Nor will such acquittal bar a prosecution for robbery committed on another floor of a house entered, "although the two occurrences might take place as soon as a person could pass from the upper story to the lower one." People v. Kern, 8 Utah 268, 30 Pac. 988.

In Minnesota a statute provides that: "A person who having entered a building under such circumstances as constitutes burglary in any degree, commits any crime therein, is punishable therefor as well as for the burglary, and may be prosecuted for each crime separately." State v. Hackett, 47 Minn. 425, 50 N. W. 472, 28 Am. St. Rep. 380. Here is an explicit rule of statute, and presumptively it was needed to abolish the rule of merger.

Cognate rulings are found in other cases. For example, an acquittal of rape, assault with intent, etc., will not bar prosecution for burglary with intent to commit rape. Com. v. Dudly, 10 Kulp. (Pa.) 366. Later it was held that one convicted of rape could not be tried for burglary in its perpetration. Com. v. Reed, 4 Lanc. L. Rev. 89. This was, no doubt, on the principle of rape being a higher crime in which the burglary was merged.

It was ruled that acquittal of robbery did not bar burglary with intent to murder, because there was no possibility of defendant being convicted of robbery under the latter prosecution. Nagel v. People, 229 Ill. 598, 82 N. E. 315. This ruling was under decision as to what was "same offense," and its test was as above stated.

We do not think the doctrine of merger is an obsolete principle in criminal law and we do not perceive that there is anything in federal statute as explicit as is the statement in Minnesota law, *supra*, and, though the instant case comes from our highest court, it does not appear to be so conclusively a decision on principle, that it should be listed with cases opposing the rule of merger. C.

JETSAM AND FLOTSAM.

OFFSET FOR STORAGE.

In the awakening days of the west there was no more picturesque feature than the administration of justice by the solemn-visaged men who were chosen by an admiring constituency for their "horse sense" rather than their knowledge of law. Indeed too much erudition was regarded as a serious interference with justice. A man who could approximate the number of rails a cottonwood tree would yield, or guess at the staying powers of oxen by the looks of their eyes, was better qualified to decide between the rights of men than a scholarly gentleman who had waded through Blackstone et al.

The other day the compilers of the Macon County History run across this entry in an old yellow volume of the Circuit Court:

"Kain v. Hopper; watermelons; trespass; appeal."

"Watermelons." That looked funny to the history man. How could watermelons trespass? He was hunting odd things, and this looked like a lead. The young Circuit Clerk said there was nothing in it; "those old fellows put lots of things down that don't mean anything."

The answer didn't satisfy the history man. The entry was dated 1849, and he thought he

might be able to find some old lawyer who knew something about the case, but it seems none had ever heard of it. When the historian in the course of his pilgrimage reached Easley township he brought the matter up with a patrician who, he said, "had lived there always." He smiled when the case was mentioned.

"I was in Judge Easley's court when he made the decision," he said.

This is the story of the case as related by the white haired settler of Easley township:

Timothy Kain farmed forty acres on the bottom of the Chariton. One Spring he set out a lot of watermelon seed. The vines spread out like fringes across the line dividing Kain and Felix Hopper, and kept going. When the watermelons grew up there were nearly as many on Hopper's land as on Kain's. Where they grew on Hopper's was wild land and Kain didn't suppose Hopper would make any objection, but when he went to pick his melons, Hopper was there with an old flintlock and a bull dog. He wouldn't let the grower touch the melons. Angry and bent on teaching Hopper a lesson, Kain filed suit before Squire Easley, setting up the value of ten watermelons at 15 cents apiece, and asking damages for detention and preventing him from enjoying his property. Squire William Easley, for whom the township was named, was a tall, soldiery-looking man, quick in action, and as conscientious a man as ever lived.

"The lawyers for Kain read from ponderous books to show that the plaintiff's rights traveled along with his vines, and that every melon nurtured by his soil was his, no matter if the vines should go off on an exploring expedition to China.

"Hopper's lawyers produced equally heavy authority to prove that Hopper was entitled by law to everything that camped on his premises. It wasn't Hopper's fault, they said, if Kain's vines took a notion to spread out and go a visiting; suppose the hillside should slip down on Hopper's land—would any reasonable man claim he had lost the right of his possession because another man's farm had tumbled down on him? Would any sane man contend that such was the law?

"It looked to me like they had the Squire going some, but he never let on—just 'set' still and looked wise, which he was.

"When the parties had told their tales and the lawyers got through shoutin' the Squire arose to his full six feet two and pulled off his specs. Then, as I remember it, he talked like this:

" 'Mr. Bumpus has read books that make it absolutely sure them melons belong to the plaintiff Kain. I hadn't any doubt in the world about that until Judge McHenry got the floor and turned Mr. Bumpus' law bottom side up. There's no doubt in my mind but what there's enough law in all these books for both Kain and Hopper, and that ought to make 'em happy. It would me. But when the law is absolutely on both sides of a case what is the court to do? Why he has to disregard the law and settle it on the principles of justice. Now, the judgment of the court is that them are Kain's melons——"

"Thank you, your honor,' said Bumpus, arising and bowing to the Squire, very gratefullike.

" 'But he's indebted to Hopper 20 cents apiece for storage,' concluded the court.

"But, your honor,' cried Bumpus, mad as a March hare, 'you can't do that! They haven't filed any claim for storage. Besides you're allowing Hopper more for storage than the melons are worth.'

" 'The court will take judicial notice of the defendant's rights, offset or no,' returned Squire Easley, with finality. 'No man shall be cheated out of his due in this court. And, besides, your own evidence shows Hopper was faithfully guarding Kains melons for him. That's worth something.'

" 'Guarding them?'

" 'Yes. Kain himself testified Hopper was there with a rifle and a bull-dog when he climbed over the fence.' "

EDGAR WHITE.

Macon. Mo.

BOOK REVIEWS.

NORTON ON BILLS AND NOTES, FOURTH EDITION.

The fourth edition of this standard work, placed in the Hornbook Series by its publishers is by Wm. U. Moore, Professor of Law, University of Wisconsin, and Harold M. Wilkie, of the Milwaukee bar.

This volume is a revision of the third edition appearing in 1900 and supplements that edition so as to exhibit the Uniform Negotiable Instruments Law as the most important authoritative statement of the law of negotiable bills and notes in the United States.

All of the cases decided under this Act are down to April, 1914, the Uniform Commission-

er's draft being given in appendix, together with list of states, territories and possessions of the United States in which the law is of force. As a great convenience there is a table of section numbering in the different jurisdictions so as to correspond with the commissioners' draft.

This book also has frequent reference to the English Bills of Exchange Act. This work gives evidence of great and painstaking research and should be of very great use to practitioners. It is bound in law buckram, is of neat, substantial appearance, and comes from West Publishing Co., St. Paul, Minn., 1914.

DOBIE ON BAILMENTS AND CARRIERS.

This work, in one volume, by Mr. Armistead M. Dobie, of the University of Virginia, originally was intended as a second edition of Hale on Bailments and Carriers. This plan was abandoned and a new work with different analysis and treatment was undertaken.

The author's style is clear and succinct and particular care is bestowed on the notes and the citation of cases supporting the principles stated in the text. Also the effort rather is in the way of selecting cases of importance and by courts of excellent reputation than to make them exhaustive.

At the beginning of each section the proposition to be treated is set out and this is followed by stating the phases in which it comes into play, with authority cited for each phase or situation. This is an effective method of treatment, and coming as it does just after the catch-words introducing the section fixes attention on what therein is to be developed. Thus to illustrate what is meant we refer to Section 16 of Part I, of the work devoted to the subject of Bailments, and notice that the catch-words are, "Care to be Exercised by the Bailee," and these are followed by "In performing the bailment purpose, the bailee must exercise due care, or that degree of care, which is determined by, and commensurate with, the particular class to which the specific bailment belongs." This proposition then is considered in multiple ways and authority cited.

There is abundant evidence of painstaking care in this work and it should meet with popular acceptance.

The book is quite attractively gotten up in its binding of law buckram and comes in the Hornbook Series published by West Publishing Company, St. Paul, Minn., 1914.

HUMOR OF THE LAW

Judge—"Have you anything to say for yourself before I sentence you, prisoner?"

Prisoner—"Yes, your lordship; I taught your wife and daughter the tango."

Judge—"Twenty years."

Law Students' Helper.

Two college students were arraigned before the magistrate charged with hurdling the low spots in the road in their motor-car.

"Have you a lawyer?" asked the magistrate.

"We're not going to have any lawyer," answered the elder of the students. "We've decided to tell the truth."

Law Students' Helper.

It seems that a lawyer is something of a carpenter. He can file a bill, split a hair, chop logic, dove-tail an argument, make an entry, get up a case, frame an indictment, empanel a jury, put them in a box, bore a court, chisel a client, and other like things.—Law Students' Helper.

An irascible lawyer was having trouble with the telephone. He could hear nothing but a confused jumble of sounds, and finally became so exasperated that he shouted into the transmitter:

"Is there a blithering fool at the end of this line?"

"Not at this end," answered a cool, feminine voice.—Exchange.

Cardinal Gibbons made the opening prayer at the Democratic National Convention in Baltimore.

There were two doorkeepers on the main door. One was a very devout Catholic and the other was not.

As the Cardinal came down the aisle to go to his home the Catholic doorkeeper leaned across to the other and said:

"Hey, Jim, be sure to touch the Cardinal when he goes out!"

"What pocket has he got it in?" asked Jim, hoarsely.—Saturday Evening Post.

A country notary, writes Henry W. Ballantine, in Case and Comment, was applied to by an unhappy couple for a divorce. He arose to the occasion and speedily effected the desired partition, severance or release, by having the respective parties execute and record quit-claim deeds of all right, title and interest held by them as life tenants in and to each other. The clouds of their title to happiness and freedom being thus removed, the supposedly disjoined grantees went their several ways rejoicing.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Acknowledgment**—Married Woman. — A married woman denying that she signed a deed or acknowledged it as evidenced by a certificate of acknowledgment in due form has the burden of proving that she did not sign or acknowledge it.—Polk v. Brown, Ark., 174 S. W. 562.

2. **Adverse Possession**—Life Tenant.—Where the interest which plaintiff and his wife attempted to convey was only a remainder to take effect after the death of the wife's mother, the life tenant, possession of grantee did not become adverse until death of life tenant.—Parsons v. Justice, Ky., 174 S. W. 725.

3. **Bankruptcy**—Chattel Mortgage. — Under Bankr. Act, chattel mortgage, though withheld from record, held valid against creditors who did not acquire a lien before it was recorded. —In re Marriner, U. S. D. C., 220 Fed. 542.

4.——Compromise.—Payment under compromise of controversy over stock transferred to bankrupt's wife, and release of claims by wife, held to be returned, where provision of compromise as to withdrawing objections to discharge was not carried out.—In re Doyle, U. S. C. C. A., 220 Fed. 434.

5.——Tax Sales.—Tax sales of a bankrupt's property, made after adjudication of bankruptcy, may be avoided.—Stanard v. Dayton, U. S. C. C. A., 220 Fed. 441.

6. **Banks and Banking**—Joint Account.—Where funds are deposited in a bank to the joint account of a husband and wife, the bank cannot, without special authority, pay them out on checks signed by the wife alone.—Gish Banking Co. v. Leachman's Adm'r, Ky., 174 S. W. 492.

7. **Bills and Notes**—Collateral.—A holder of notes received as collateral is not entitled to enforce them after payment of the principal obligation.—In re Philpott's Estate, Iowa, 151 N. W. 825.

8.——Negotiable Instruments Law.—The Negotiable Instruments Law does not prescribe an exclusive method of transferring negotiable instruments, but only the manner in which their independence of equities may be preserved.—Carter v. Butler, Mo., 174 S. W. 399.

9.——Negotiable Instruments Law.—Negotiable Instruments Act, § 4973, refers only to a conditional delivery to a payee of which he is advised at the time.—Ex parte Goldberg & Lewis, Ala., 67 So. 839.

10.——Notice of Protest.—A notice of protest regularly mailed, under Code 1906, c. 99, § 8, binds an indorser, though not received by him.—Board of Education of District of Northfork v. Angel, W. Va., 84 S. E. 747.

11. **Boundaries**—Description.—Description in deeds and partition decrees of the boundary between points B and C as ordinary high-water mark is not limited by the statements of the distance between such points in a straight line. —Wheatley v. San Pedro, — A. & S. L. R. Co., Cal., 147 Pac. 135.

12. **Carriers of Goods**—Unlawful Shipment.—A carrier of an interstate shipment of game is not liable to the shipper, where the shipment was unlawful or the shipment was seized at destination by lawful authority.—Jonesboro, L. C. & E. R. Co. v. Adams, Ark., 174 S. W. 527.

13. **Carriers of Passengers**—Alighting.—The moving of a train while passengers were alighting is negligence, though the motion be an ordinary one, incident to the operation of the vehicle.—Illinois Cent. R. Co. v. Williams, Ky., 174 S. W. 741.

14.——Negligence.—It is not negligence per se to operate an elevator without a call bell in an unfinished building open only to employes and licensees of the contractor.—Wright v. Selden-Breck Const. Co., Neb., 151 N. W. 926.

15.——Regulation.—A requirement that passengers without tickets pay an additional sum is not unreasonable, where they have an opportunity to procure tickets.—Ponder v. Lexington & E. Ry. Co., Ky., 174 S. W. 786.

16. **Champerty and Maintenance**—Illegality. —An agreement between an attorney and client which seeks to deprive the client of right to settle a claim for personal injuries is void.—Greenleaf v. Minneapolis, St. P. & S. S. M. Ry. Co., N. D., 151 N. W. 879.

17. **Commerce**—Intoxicating Liquors.—Ordinance prohibiting soliciting or taking of orders for intoxicating liquors in precinct wherein voters had declared against license held not to prevent shipment of goods in interstate commerce.—Ex parte Coombs, Cal., 147 Pac. 131.

18.——Supreme Law.—When the federal Employers' Liability Act applies, it is the supreme law of the land, and supersedes all other remedies.—Delaware, L. & W. R. Co. v. Yurkonis, U. S. C. C. A., 220 Fed. 429.

19. **Constitutional Law**—Game and Fish.—The legislature may preserve game and fish and make regulations therefor, and may select territory, where preservation is found necessary, and prescribe regulations there not imposed

elsewhere without violating Const. art. 2, § 18. —Jonesboro, L. C. & E. R. Co. v. Adams, Ark., 174 S. W. 527.

20.——Initiative and Referendum.—Since the adoption of the initiative and referendum amendment (Laws 1911, p. 136), which repealed Const. art. 2, § 31, the courts should scrutinize a legislative declaration of an emergency and declare it void where obviously false.—State v. Meath, Wash., 147 Pac. 11.

21.——Taxation.—Assessment of railroad operating property as an entirety by including intangible elements of value affecting its property not included in assessment of other property held not to violate due process clause of Const. U. S. Amend. 14.—Northern Pac. Ry. Co. v. State, Wash., 147 Pac. 45.

22. **Contempt**—Judicial Code. — The test whether misbehavior is within Judicial Code, § 268, is not the physical propinquity of the act to the court, but is its tendency to directly affect the administration of justice.—United States v. Toledo Newspaper Co., U. S. D. C., 220 Fed. 458.

23. **Contracts**—Embezzlement.—A contract to repay money embezzled is not invalidated by the pendency of criminal proceedings against the wrongdoer, unless it is part of the consideration that the prosecution shall be suppressed. —Board of Education of District of Northfork v. Angel, W. Va., 84 S. E. 747.

24.——Mutuality.—Where a contract required defendant to accept such ties as plaintiff could deliver within a stipulated time, there is no want of mutuality; plaintiff being required to use reasonable diligence in procuring and delivering ties.—Ayer & Lord Tie Co. v. O. T. O'Bannon & Co., Ky., 174 S. W. 783.

25.——Mutuality.—A contract to furnish railroad ties held void for want of mutuality, where the purchaser promised to take 200,000 ties, but the seller was not bound to furnish that many. —Hudson v. Browning, Mo., 174 S. W. 393.

26. **Copyrights**—Motion Picture Play.—Under the Copyright Act, as amended in 1912, the rights to dramatize a novel in the usual form and in the form of a motion picture play are separable, and there may be a copyright for each dramatization.—Photo-Drama Motion Picture Co. v. Social Uplift Film Corporation, U. S. C. C. A., 220 Fed. 448.

27. **Corporations**—Domicile.—The charter of a foreign corporation or the statute under which it was organized determines the liability of resident shareholders to its creditors, and, if a shareholder is liable at all, he is liable only according to the law of the corporation's domicile.—Nesom v. City Nat. Bank, Tex., 174 S. W. 715.

28.——Joint Promise.—Where two stockholders agreed to take new stock and furnish a specified sum as needed, their promise to pay for the stock was joint.—First Trust Co. v. Miller, Wis., 151 N. W. 813.

29.——Jurisdiction.—It is essential to jurisdiction in personam over a foreign corporation that it be carrying on business through some agent in the state, and that there be a local statute making it amenable to suit.—W. J. Armstrong Co. v. New York Cent. & H. R. R. Co., Minn., 151 N. W. 917.

30. **Courts**—Jurisdiction. — Concession, contrary to the facts, that parties were engaged in interstate commerce, as alleged in the complaint, held not to give jurisdiction on that ground.—Delaware, L. & W. R. Co. v. Yurkonis, U. S. C. C. A., 220 Fed. 429.

31. **Covenants** — General Warranty. — A covenant of general warranty does not protect against every adverse claim which may be asserted, but only against claims asserted and enforced under title paramount to that conveyed. —Walker v. Robinson, Ky., 174 S. W. 503.

32.——Restrictions.—In enforcing covenants restricting the use of lands, courts of equity will look to the purpose to be accomplished, and will not require a strict performance when the scheme has been abandoned.—Melson v. Ormsby, Iowa, 151 N. W. 817.

33. **Criminal Law**—Discretion.—Where accused was represented by attorneys, continuance held properly denied because a different attorney refused to defend accused and because excitement and ill feeling over a homicide had prevented the necessary preparation for trial.—Harris v. Commonwealth, Ky., 174 S. W. 476.

34.——Self-Crimination.—Where one under arrest hands his shoe to the officer, who places it in a track, the latter may testify that the shoe fitted the track, though he did not warn the former against incriminating evidence.—Lee v. State, Fla., 67 So. 883.

35. **Courtesy**—Seisin.—Where wife was entitled to remainder interest, but life tenant, who predeceased her, had been in actual possession, and where after the life tenant's death, a third person was in adverse possession, there was no such seisin during coverture as vested in surviving husband an estate by courtesy.—Parsons v. Justice, Ky., 174 S. W. 725.

36. **Damages**—Growing Crops.—The measure of damages for the destruction of growing crops being their value immediately before destruction, the jury must consider the probable yield, the market price, and the cost of production.—Southwestern Portland Cement Co. v. Kezer, Tex., 174 S. W. 661.

37. **Death**—Parties.—The personal representatives of the deceased, being mere trustees for the heirs, cannot maintain an action for death, unless there are heirs.—Slaughter v. Goldberg, Bowen & Co., Cal., 147 Pac. 90.

38. **Electricity**—Inspection.—Where an electric light company did not know of defects in the wires and apparatus within the building of one of its patrons, it was under no duty to inspect for such defects.—Smith's Adm'x v. Middlesboro Electric Co., Ky., 174 S. W. 773.

39. **Eminent Domain**—Irrigation District.—The rights of a land owner under water right contracts are property which cannot be taken by an irrigation district without payment of just compensation. Rev. Codes, § 2422.—Nampa & Meridian Irr. Dist. v. Briggs, Idaho, 147 Pac. 75.

40.——Right of Way.—Where a right of way for transmission of electricity is condemned, the owner may recover actual depreciation to his remaining land by the presence of the right of way; but mere fears of the people cannot be made a basis on which to predicate depreciation.

—Alabama Power Co. v. Keystone Lime Co., Ala., 67 So. 833.

41. **Explosives**—Blasting.—Blasting, especially in a populous neighborhood, is so dangerous that a person engaged therein is liable for injury caused thereby without proof of negligence.—Carson v. Blodgett Const. Co., Mo., 174 S. W. 447.

42. **False Imprisonment**—Liability.—A person not controlling or contributing to the act of another causing the arrest and prosecution of a third person is not liable to the third person for false imprisonment.—Prentiss v. Bogart, Wash., 147 Pac. 39.

43. **False Pretenses**—Intent.—It is no defense to a prosecution for false pretenses that the defendant intended at some future time to repay the money obtained, or to repay if prosecution was instituted against him.—State v. Cooper, Iowa, 151 N. W. 835.

44.——Promises.—A promise and failure to perform will not authorize a conviction of cheating and swindling.—Fennell v. State, Ga., 84 S. E. 721.

45. **Fences**—Tearing Down.—Where a person in possession and those under whom she claimed had been in possession for more than 20 years, the act of another tearing down the fence on the premises as a step toward taking forcible possession was unlawful.—Johns v. State, Tex., 174 S. W. 610.

46. **Finding Lost Goods**—Test of Loss.—Money found by a customer of a safety deposit company in a private room of the company is not lost, and the customer may not recover possession as against the company.—Foster v. Fidelity Safe Deposit Co., Mo., 174 S. W. 376.

47. **Fraud**—Damages.—Representations by a vendor as to the value of land, which the vendor expressly states he has never seen, cannot be made the basis of damages as fraudulent.—Bunck v. McAulay, Wash., 147 Pac. 33.

48.——Reformation of Contract.—Where part of a written contract is omitted by fraud or mistake, the contract may be reformed, and damages awarded for its breach, as reformed, though the omitted part is within the statute of frauds.—Castleman-Biltmore Co. v. Pickrell & Craig Co., Ky., 174 S. W. 749.

49. **Frauds, Statute of**—Memorandum.—Notwithstanding statute of frauds, memorandum which by mistake failed to state agreement for sale of land held to be reformed to conform to the admitted intent of the parties.—McMee v. Henry, Ky., 174 S. W. 746.

50.——Possession of Land.—For possession to be sufficient to take a parol contract to convey land out of the statute of frauds it must have been taken under the contract and be exclusive, notorious and continuous.—Williams v. Bailey, Fla., 67 So. 877.

51. **Fraudulent Conveyances** — Undue Influence.—Where the grantee exercised undue influence over the mind of the grantor, a court of equity will set aside the conveyance, although the conveyance, as made, was also fraudulent as to the grantor's creditors.—Vanderpool v. Vanderpool, Ky., 174 S. W. 727.

52. **Gifts**—Confidential Relationship.—That a daughter was caring for her mother, accompanied her to a bank, where the mother got a note, and to a lawyer, where the mother assigned it to her as a gift, raises no presumption of confidential relation or undue influence.—Nicholson v. Duff, Mo., 174 S. W. 451.

53. **Highways**—Burden of Proof.—A pedestrian on a path used as a highway, injured by stepping into a hole filled with hot water, caused by a defect in a pipe under the surface, must prove negligence in maintaining the pipe.—Mullett v. Clarendon Electric Light & Ice Co., Ark., 174 S. W. 560.

54. **Homicide**—Self-Defense.—Where accused, while unarmed and with no intention to kill, brought about a difficulty, that fact did not preclude him from relying upon self-defense.—Lucas v. State, Miss., 67 So. 851.

55. **Indemnity**—Estoppel.—That a contractor paid damages to an employe injured because of the defective plans for the work adopted by the city, without requiring the claim to be reduced to judgment, does not prevent him from recovering over from the city.—Aberdeen Const. Co. v. City of Aberdeen, Wash., 147 Pac. 2.

56. **Insurance**—Credit Insurance.—Credit insurance bonds, like other insurance policies, if ambiguous in their language, are to be construed strictly against the insurer, by whom they were framed.—Philadelphia Casualty Co. v. Fechheimer, U. S. C. C. A., 220 Fed. 401.

57.——Delivery of Policy.—Delivery of a life insurance policy to the insurer's solicitor for unconditional delivery to insured, and mailing of the policy by the solicitor to insurer, held to render the policy binding.—Sutton v. Wright, Kan., 147 Pac. 62.

58.——Estoppel.—The act of a medical examiner in writing false answers in the application for a policy to be issued by a fraternal insurer held not to estop the insurer from relying on the falsity of such representation to avoid the insurance.—Sovereign Camp Woodmen of the World v. Lillard, Tex., 174 S. W. 619.

59.——Loss by Fire.—Where insured property is totally destroyed as the result of three fires, the measure of recovery for the final fire is the face of the policy, where insured has complied with its terms.—Schmidt v. Williamsburg City Fire Ins. Co. of Brooklyn, N. Y., Neb., 151 N. W. 920.

60.——Surety Bond.—Clear language must be used in a fidelity bond to render the surety liable under it for past defaults.—Adams Co. v. Western Surety Co., S. D., 151 N. W. 890.

61. **Interest**—Mortgage Debt.—A mortgage debt ordinarily bears interest at the contract rate to date of final decree, after which the amount found to be due for principal, interest, and attorney's fees bears interest at the statutory rate.—American Securities Co. v. Goldsberry, Fla., 67 So. 862.

62. **Libel and Slander**—Actionable per se.—To say to an attorney, "The contract you claim to have with this man was not signed by him, and he is here to tell you," is not actionable per se, as imputing a forgery.—Fensky v. Maryland Casualty Co., Mo., 174 S. W. 416.

63.——Libelous per se.—A publication, tending to provoke plaintiff to wrath, to expose him to public hatred and ridicule, or deprive him of

public confidence, is not necessarily libelous under Rev. St. 1909, § 4818.—McWilliams v. Workers' Printing Co., Mo., 174 S. W. 464.

64. **Limitation of Actions**—Accrual of Action. —A cause of action for services rendered decedent upon a promise of a definite legacy does not accrue until the promisor's death, and the statute of limitations does not begin to run until the accrual.—Benge's Adm'r v. Fouts, Ky., 174 S. W. 510.

65. **Malicious Prosecution**—Continuance. — A person setting on foot a malicious prosecution is liable for its continuance and malfeasance of the officer making the arrest.—Lyons v. Davy-Pochahontas Coal Co., W. Va., 84 S. E. 744.

66.——Evidence.—Proof of an acquittal is not prima facie evidence of want of probable cause. —Williams v. Pullman Co., Minn., 151 N. W. 895.

67. **Master and Servant**—Fellow Servants.— Where plaintiff was injured while turning the span of a drawbridge in compliance with signals of the defendant's superintendent, held, that the superintendent and plaintiff were not fellow servants, and that the superintendent's failure to warn plaintiff violated a duty owed by the bridge company.—Stocks v. Leavenworth Terminal Ry. & Bridge Co., Kan., 146 Pac. 1178.

68.——Negligence.—Act of conductor in failing to turn a switch, whereby cars go on a switch track and strike cars there, killing an employe, held negligence, within the federal Employers' Liability Act.—Walsh v. Lake Shore & M. S. Ry. Co., Mich., 151 N. W. 754.

69.——Negligence.—Where an employe was injured while unloading marble slabs, due to his undertaking to obey an order without the assistance of other workmen, held, that defendants were not negligent in giving the order, where the danger must have been obvious to the employe.—Willis v. Skinner, Kan., 147 Pac. 60.

70.——Negligence.—The failure of a master to install lightning arresters to protect the operators of its electric elevators held negligence, regardless of the custom in similar buildings.— Melcher v. Freehold Inv. Co., Mo., 174 S. W. 455.

71.——Safe Place.—Defendant held not relieved from all liability for negligence to his servant injured while engaged in construction work, although the doctrine of safe place to work did not apply.—Benson v. Jones & Laughlin Ore Co., Mich., 151 N. W. 707.

72.——Warning.—A master who discovers changes from gradual wear and tear of machinery should warn the servant of their existence.—Smith v. City of Rome, Ga., 84 S. E. 734.

73.——Workmen's Compensation Act.—Where the preliminary hearing on a motion to dismiss an appeal from a judgment under the Workmen's Compensation Act satisfies the court that no doubtful questions of law are involved and no ground for reversal exists, the judgment will be affirmed.—Cain v. National Zinc Co., Kan., 146 Pac. 1165.

74.——Workmen's Compensaton Act.—An employer not electing to come under the Workmen's Compensation Act held deprived of the defenses of contributory negligence, negligence of fellow employe, and assumption of risk.— Lydman v. De Hass, Mich., 151 N. W. 718.

75. **Mechanics' Lien**—Evidence. — Conversations between materialman furnishing material to contractor and owner held not to show that the owner understood that the materialman was relying upon owner's promise and would forego the lien.—Central City Lumber Co. v. Weber, Mich., 151 N. W. 675.

76. **Municipal Corporations** — Estoppel. — Where taxpayers of a town had notice of a proposed sale of a light and water plant and made no objection, they were estopped from assailing the validity of a sale, but the estoppel terminated on breach of contract of sale.—Town of Augusta v. Smith, Ark., 174 S. W. 543.

77.——Implied Warranty.—In the absence of a stipulation in a contract for the grading of streets according to plans prepared by the city that the contractor warrants the sufficiency of the plans, no such warranty by him can be implied, but the sufficiency is warranted by the city.—Aberdeen Const. Co. v. City of Aberdeen, Wash., 147 Pac. 2.

78.——Independent Contractor. — Contractor, without knowledge or reason to apprehend that another's agent delivering plaster would create a dangerous condition, held not liable to plaintiff, injured in consequence thereof.—Schneider v. C. H. Little Co., Mich., 151 N. W. 587.

79.——Independent Contractor.—One for whom blasting is being done adjacent to a public street cannot avoid liability for injuries to travelers for debris thrown by the blast, by delegating the work to an independent contractor.—Carson v. Blodgett Const. Co., Mo., 174 S. W. 447.

80. **Navigable Waters**—Riparian Owners.— All rights of riparian owners over adjacent tidelands are subject to the public easements for the purpose of navigation, and must yield thereto when asserted by the state or its agencies.— Patton v. City of Wilmington, Cal., 147 Pac. 141.

81. **Negligence**—Infant.—A boy of 13 was not guilty of contributory negligence if he exercised the prudence that a child of his age, intelligence, and experience would ordinarily manifest under the circumstances.—Dowlen v. Texas Power & Light Co., Tex., 174 S. W. 674.

82. **Partnership**—Estoppel.—Persons engaging in business, making false representations to induce a third person to purchase the business and assets, held estopped from denying that they were partners.—Schwier v. Hurlburt, Mich., 151 N. W. 603.

83.——Retirement.—A retiring partner is not liable to a creditor who first dealt with the firm thereafter, though he gave no notice of his retirement, if there was nothing to induce a belief that he was still a member.—Raywinkle v. Southern Coal Co., Ark., 174 S. W. 524.

84. **Physicians and Surgeons**—Negligence.— That a physician adopted a particular method in reducing a fracture, does not, where it had considerable medical support, show him to be guilty of negligence.—Lorenz v. Booth, Wash., 147 Pac. 31.

85. **Principal and Agent**—Damages.—On the manufacturer's breach of a contract giving an exclusive agency, held, that the agents could recover their reasonable expenses in canvassing, advertising, and demonstrating, but not for their services.—Emerson-Brantingham Co. v. Lyons, Kan., 147 Pac. 58.

86. **Railroads** — Contributory Negligence. — While a traveler cannot rely solely upon the

absence of a watchman at a crossing as an indication of safety, yet it may be considered by the jury as to whether the traveler's failure to take precautions was contributory negligence.—Tennessee Cent. R. Co. v. Gilbert, Tenn., 174 S. W. 812.

87. **Receivers**—Ancillary Proceedings. — A foreign receiver has no extraterritorial jurisdiction, so that, where no ancillary proceedings for the appointment of a receiver are commenced in this state, title to property here does not vest in him.—Nesom v. City Nat. Bank, Tex., 174 S. W. 715.

88. **Reference**—Special Master.—It is competent for a federal court to refer an action at law by consent of the parties, and the fact that the referee is designated a "special master" does not impair the validity of the reference.—Philadelphia Casualty Co. v. Fechheimer, U. S. C. C. A., 220 Fed. 401.

89. **Reformation of Instruments**—Bills and Notes.—A note may be reformed so as to supply the omission of the time of payment.—In re Philpott's Estate, Iowa, 151 N. W. 825.

90.——Mortgage. — Though a mortgage, through mistake, did not correctly describe the premises, the description in the mortgage cannot, after foreclosure and sheriff's sale, be reformed in a suit merely to reform the sheriff's deed.—Stearns v. McHugh, S. D., 151 N. W. 888.

91. **Rewards**—Officer.—The rule that an officer may not receive a reward or any part of it for the arrest and conviction of offenders, does not apply where the officer has no duty to perform in making an arrest.—Chambers v. Ogle, Ark., 174 S. W. 532.

92. **Robbery**—Distinguished from Larceny.—The force which distinguishes robbery from larceny from the person where the property is taken without the owner's knowledge may be no more than is used in breaking a watch chain.—Bowen v. State, Ga., 84 S. E. 730.

93. **Sales** — Evidence. — Where defendant breached its contract to accept such ties as plaintiff could deliver within a reasonable time, proof of contracts made by plaintiff for the purchase of ties of the kind required is admissible on the question of damages.—Ayer & Lord Tie Co. v. O. T. O'Bannon & Co., Ky., 174 S. W. 783.

94. **Specific Performance**—Evidence.—Where specific performance is sought, the court may hear evidence of every fact and circumstance attending the negotiation and execution of the written agreement.—Crown Orchard Co. v. Dennis, U. S. D. C., 220 Fed. 516.

95. **Taxation**—Omitted Property.—Where the state board discovers that property in any railroad or public service corporation has been omitted, it may assess same and add arrearages of taxes against the property in connection with the assessment for a subsequent year.—Prairie Oil & Gas Co. v. Cruce, Okla., 147 Pac. 152.

96.——Service by Publication.—Where title stands in full name of owner, tax judgment in proceeding brought by publication in which she is designated only by her initials, and the deed thereunder, held void.—Stevenson v. Brown, Mo., 174 S. W. 414.

97. **Telegraphs and Telephones**—Damages.—Physical discomfort and suffering from a cold held not proper elements of damage for delay in delivering a telegram, defendant not being chargeable with notice of probability of such a result.—Western Union Telegraph Co. v. Holder, Ark., 174 S. W. 552.

98. **Tenancy in Common**—Adverse Possession. —A tenant in common dealing with property as owner and conveying to the public the impression that he is holding adversely to his cotenants may acquire title by adverse possession in 10 years.—Hart v. Eldred, Mo., 174 S. W. 380.

99.——Adverse Possession.—On death of life tenant, possession of tenant in common in remainder became adverse as against cotenant whose ineffectual deed had been delivered to him, since the deed itself was notice of his adverse holding.—Parsons v. Justice, Ky., 174 S. W. 725.

100. **Trade-Marks and Trade-Names**—Unfair Competition.—Act of manager of a merchant suing to restrain a rival merchant from unfair competition, in sending a female into the rival merchant's store on a wager that she would be insulted held not to deprive the merchant of equitable relief.—Joseph S. Baum Mercantile Co. v. Levin, Mo., 174 S. W. 442.

101. **Trusts**—Estoppel.—Where a son accepted an absolute conveyance from his father, with the understanding that upon reimbursement for advances the property should be returned, the trust will be enforced upon the son's repudiation.—Vanderpool v. Vanderpool, Ky., 174 S. W. 727.

102. **Vendor and Purchaser**—Forfeiture.—A contract for the sale of real estate held not forfeited for nonpayment of a note placed in a bank, where the purchaser directed the cashier to apply a deposit thereon, but he failed to indorse payment before maturity.—Oliver v. Scott, Ark., 174 S. W. 557.

103.——Constructive Notice.—A purchaser of land held not to have had constructive notice of a deed of trust on a portion of it which wholly misdescribed the property.—Wiseman v. Watters, Tex., 174 S. W. 815.

104.——Notice.—A landowner's possession of land and use of water, together with stipulations in certain deeds, held to put an irrigation district on notice of the landowner's claims under water right deeds from the district's predecessor, though such deeds were not so acknowledged as to entitle them to go on record.—Nampa & Meridian Irr. Dist. v. Briggs, Idaho, 147 Pac. 75.

105. **Waters and Water Courses**—Consideration.—An agreement to pay an annual assessment for maintenance of an irrigation system held to be a part of the consideration on which water right deeds executed by the predecessors of plaintiff irrigation district to defendant were based.—Nampa & Meridian Irr. Dist. v. Briggs, Idaho, 147 Pac. 75.

106.——Servient Tenement.—Burden upon servient tenement by flow of surface water arising upon dominant tenant held not to be increased by act of dominant tenant in increasing the mass of water.—Village of Sand Lake v. Allen, Mich., 151 N. W. 705.

107. **Wills**—Counsel Fees.—Where suit by executrix, ostensibly for construction of a will, sought recovery of one-third interest in real and personal property, services of her counsel were not rendered for benefit of estate, and hence their fee was not allowable out of estate.—Goddard's Ex'x v. Goddard, Ky., 174 S. W. 743.

108.——Undue Influence.—Undue influence over testator may be established by circumstantial evidence, but the evidence must support a fair inference that such influenec was exercised, and that beneficiaries were intimate friends of testator, or fact of opportunity or mere suspicion are insufficient.—In re McKeand, Mich., 151 N. W. 731.

109. **Witnesses**—Competency.—In action for injuries in train wreck, testimony of witness as to condition of ties held competent, notwithstanding his lack of knowledge as to the exact place of the accident.—Marshall v. Wabash R. Co., Mich., 151 N. W. 696.

110.——Cross-Examination. — A thorough cross-examination of an attorney, testifying in his own behalf in a suit for specific performance of a verbal contract with his client for the conveyance of land, held proper.—Williams v. Bailey, Fla., 67 So. 877.